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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 213

H. T. SHELTON,

Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (15th Judicial District of Texas) is unreported, but is printed as Sec. A of App. A of Petition, p. 35.

The original opinion of the intermediate appellate court (Court of Civil Appeals, Fifth Supreme Judicial District of Texas) is reported at 383 S.W. 2d 842, and printed as Sec. B of App. A of Petition, p. 45.

That Court's opinion on rehearing (including the dissenting opinion of Justice Williams) is reported at 383 S.W. 2d 849, and printed as Sec. C. of App. A of Petition, p. 58.

The orders of the Supreme Court of Texas refusing petitioner's application for writ of error, with notation, no reversible error, and denying rehearing thereof are not reported, but are printed as Sec. D of App. A of Petition, p. 70, 71.

JURISDICTION

Respondent believes that this Court is without jurisdiction to grant certiorari in this cause. It was this knowledge which prevented respondent from seeking certiorari from this Court upon a far more dramatic and important issue: whether causation "in part" will apply to respondent's negligence but not to petitioner's negligence.

Respondent submits that there is no final judgment or decree rendered by the highest state court which is the indispensable prerequisite to review by certiorari. 28 U.S.C.A. 1257.

Initially, the judgment of the Texas Court of Civil Appeals lacks finality because it is a judgment of reversal remanding the case to the lower court for a re-trial.

After reviewing the aspects of the finality of state court judgments, this Court spoke clearly on this point in *Gospel*

Army v. City of Los Angeles, 331 U.S. 543, 91 L. Ed. 1662, 67 S. Ct. 1428, (1947):

> "Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

In *Urie v. Thompson*, 337 U.S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018, 11 A.L.R. 2d 252, (1949), where the Court was concerned with the finality of a prior state decision reversing and remanding the case, this Court again spoke most clearly:

> "The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute."

This rule is supported by many precedents, of both early and late vintage. *Chesapeake & O. R. Co. v. McCale* (1909), 213 U.S. 207, 53 L. Ed 765, 29 S. Ct. 430; *Missouri & K.I. R. Co. v. City of Olathe* (1911), 222 U.S. 328, 56 L. Ed. 155, 32 S. Ct. 46; *Louisiana Nav. Co. v. Oyster Commission of Louisiana* (1912), 226 U S. 99, 57 L. Ed. 138, 33 S. Ct. 78; *Bruce v. Tobin* (1917), 245 U.S. 18, 62 L. Ed. 123, 38 S. Ct. 7; *Southern P. Co. v. Gileo* (1956), 351 U.S. 493, 100 L. Ed. 1357, 76 S. Ct. 952.

The rule is likewise well delineated in the textbooks. 54 Am. Jur., p. 820, sec. 186.

The reversal and remand for another trial insures a completely new trial as though no former trial had been had. *Seydler v. Keuper*, (Austin Civ. App. 1939, writ ref.), 133 S.W. 2d 189; *Chicago R.I. & G. Ry. Co. v. Cummings*, (Waco Civ. App. 1937), 107 S.W. 2d 644, (writ dismissed).

It places the parties litigant in the same position occupied by them prior to the judgment in question. 4 Tex. Jur. 2d, p. 671, sec. 987.

Additionally, the judgment below lacks finality because the Court of Civil Appeals expressly declined to rule upon respondent's Points of Error Nos. 6 and 7, (Appendix, p. 53, 54, Opinion of Court of Civil Appeals). The language there was:

> "In its sixth and seventh points appellant complains of the submission of Special Issues Nos. 8 and 9 on various grounds. Since we have held that the jury's answer to Issue No. 9 cannot stand we shall not pass upon the question whether these two related Issues were technically defective in the form in which they were submitted."

Under the applicable procedure in Texas, the Courts of Civil Appeals are required to pass upon all issues presented by proper assignments. Rule 451, Texas Rules of Civil Procedure.

Any reversal of the judgment of the Court of Civil Appeals would necessarily leave the Points of Error Nos. 6 and 7, there raised, undecided. This cause would properly be remanded to that court to pass upon them. *Bennett v. Copeland,* (Tex. Sup. Ct. 1951), 235 S.W. 2d 605; *Block v. Aetna Casualty & Surety Co.,* (Tex. Sup. Ct. 1942), 159 S.W. 2d 470; *Wood v. Kane Boiler Works,* (Tex. Sup. Ct. 1951), 238 S.W. 2d 169.

It is obvious that this judgment lacks finality and must await its culmination in the judicial processes of the Texas

courts. *Republic Natural Gas Co. v. Oklahoma* (1948), 334 U.S. 62, 92 L. Ed. 1212, 68 S. Ct. 972.

This rule could not have been more forcefully enunciated than it was in *Gorman v. Washington University* (1942), 316 U.S. 98, 86 L. Ed. 1300, 62 S. Ct. 962; and in *Great Western Telegraph Co. v. Burnham* (1896), 162 U.S. 339, 40 L. Ed. 991, 16 S. Ct. 850.

Any granting of certiorari would thus result in fragmentation of the judicial process. It would result in piecemeal decision, dissipation of judicial energy and abdication of judicial policy. *Catlin v. United States*, (1921), 324 U.S. 229, 89 L. Ed. 911, 65 S. Ct. 631.

The judgment lacking finality, petitioner's burden of affirmatively showing jurisdiction has thus not been discharged. *Memphis Natural Gas Co. v. Beeler* (1942), 315 U.S. 649, 86 L. Ed. 1090, 62 S. Ct. 857. The application should be denied.

QUESTION PRESENTED

Whether, under Texas Special Issue procedure, a jury's negative answer to an inquiry as to whether respondent furnished petitioner a reasonably safe place in which to work accompanied by a definition, which defined it to cover negligent acts and commanded the jury to so apply it and find whether respondent had committed any negligent acts, was in irreconcilable conflict with its affirmative answer that respondent had committed a negligent act in permitting chatt, gravel, rocks, mounds of dirt or debris to remain in the area where petitioner alighted from the caboose.

STATEMENT

Respondent must challenge the accuracy of three assertions in petitioner's statement; all of which appear on page 5 of the Petition.

The first asserts that petitioner injured his back when he stepped on debris accumulated along the tracks in the area where he alighted. His pleading and proof was that he was injured by being struck in the back by a bay window, protruding from a caboose of the train from which he was alighting, and being thrown to the ground and into an engine eastbound on an adjacent track. (Tr. 3; S.F. 36)

The second asserts that Special Issue No. 9 inquires whether respondent permitted chatt, etc. to remain in the area; whereas, this issue actually inquires whether such act was negligence. (Tr. 86; App. 37)

The third assertion is that the Court of Civil Appeals rejected all contentions of respondent other than the asserted conflict. Actually, it did not do so since it declined to, and did not, pass upon the contentions in respondent's Sixth and Seventh Points of Error. (App. 53)

Traveling westward into respondent's Ray Terminal Yard on the first of two cabooses on the rear end of a switch train, petitioner ended his run by alighting from the north side near a graveled road crossing. (S.F. 28, 35) The first caboose was a cupola type; the second had a protrusion from the side in a bay window effect. (S.F. 1320, 1317)

Petitioner claimed he stepped on an object or something unidentified which was about the size of two fists or larger, lost his balance and was struck in the back by the protrusion on the last caboose. He claims to have been then thrown into an engine, eastbound on the adjacent track to the north, which he had theretofore seen but believed was stationary, and sustained injury. (S.F. 36, 37, 38)

The area where petitioner chose to alight between the north and south set of tracks and prior to reaching the switchstand is shown by pictures looking westward. (Deft. Ex. 12, p. 1325; Pltf. Ex. 13, p. 1297; Pltf. Ex. 57, p. 1307) A more distant view is shown looking eastward. (Deft. Ex. 11, p. 1224)

This conduct of petitioner in so alighting was found by the jury to be negligence, but it failed to find the required causation. (Tr. 95)

The jury failed to find that the eastbound engine struck petitioner as he claimed or that the bay window caboose was dangerous under the circumstances as he claimed. (Tr. 8, 13) In fact, only one of the many grounds of negligence submitted was found against respondent.

The jury also found that of the combined negligence, 75% was attributable to petitioner under a diminution of damage issue conditionally submitted.

The Court disregarded this finding, although the jury had earlier found petitioner guilty of contributory negligence, due to a failure to find there the required causation.

The jury found that, at some undesignated and undetermined time in the past, respondent permitted "either chatt, gravel, rocks, mounds of dirt or debris to remain in the area of the hump where plaintiff alighted from said caboose."

Thereafter, the jury answered Special Issue No. 9, which issue and answer read:

> "SPECIAL ISSUE NO. 9:
>
> Do you find from a preponderance of the evidence that such act in permitting either chatt, gravel, rocks, mounds of dirt, or debris to remain in the area of the hump where Plaintiff alighted from said caboose, if you have so found in answer to the preceding Special Issue, was negligence, as defined herein?
>
> ANSWER: Yes." (Tr. 86; App. A, p. 36)

The requisite causation "in whole or in part" was found. (Tr. 86; App. A, p. 36)

The safe place to work issue had just been submitted with instructions and answered as follows:

> "SPECIAL ISSUE NO. 2:
>
> Do you find from a preponderance of the evidence that on the occasion in question Defendant failed to furnish Plaintiff a reasonably safe place in which to work?
>
> ANSWER: Yes or No.
>
> ANSWER: No.
>
> You are instructed the Defendant was under a duty to exercise ordinary care to furnish Plaintiff a reasonably safe place in which to work, and this duty was a continuing one even though the work may have been fleeting or infrequent.

> You are further instructed that *the duty to exercise ordinary care to furnish a safe place to work* does not have reference only to the physical condition of the place itself, *but also has reference to the negligent acts*, if any, you find of Defendant's employees on the occasion in question.
>
> You are further instructed that this duty is a duty which becomes more imperative as the risk increases." (Tr. 84; App. A, p. 36) (Italics supplied)

The Court of Civil Appeals found that these two answers, taken with the issues and accompanying definitions, to be in irreconcilable conflict and reversed and remanded the cause for a new trial.

ARGUMENT

The first reason petitioner advances for the grant of a writ of certiorari is ill-founded.

The Court of Civil Appeals did not misconstrue the *Arnold* decision nor is there any support for the charge that it is engaged in restrictive interpretations as to railroad employees or attempting to side-step any holding of this Court.

The Court of Civil Appeals did not misconstrue the *Arnold* decision. Its interpretation of that case is precisely correct:

> "The Arnold case itself holds that a specific finding of no negligence will not prevail against a general finding of an unsafe place to work because the latter finding is more exhaustive in its scope." (App. to Petition 62)

The position in this cause is the reverse of *Arnold* and the Court of Civil Appeals so held. The safe place to work

finding (Special Issue No. 2) is broader than the evidentiary finding concerning chatt, gravel, etc. (Special Issue No. 9) and the Court of Civil Appeals so held. In the light of the definition given, the Court of Civil Appeals simply concluded that "the jury did not find from a preponderance of the evidence that there was any negligence on the part of appellant *(respondent here)* with reference to a safe place to work."

When the jury found negligence on the part of respondent with reference to a component going to make up a safe place to work, the Court of Civil Appeals simply held the findings "collided" and were in conflict.

The foregoing clearly demonstrates that the Court of Civil Appeals did not misconstrue *Arnold*, but to the contrary, it correctly construed that decision.

There is no support for petitioner's bald assertion that the Federal Employer's Liability Act is not understood in the light of the liberal interpretations of this Court. A mere reading of the opinions below reveals that this Act and the opinions of this Court, many of which are cited, are fully understood. The Court of Civil Appeals clearly is aware of the liberal intent and beneficent purposes of the Act and conversant with the far reaching opinions of this Court construing it.

Respondent corporation could only act through its employees and any negligent act or failure could only arise through its employees.

The generic conception of an unsafe place to work is comprehensive and must necessarily embrace and comprehend any separate components which go to make the place unsafe. In this sense, it is all encompassing. It is exhaustive in the sense that the total is the sum of all of its parts. This has to be the basic premise of *Arnold*.

An affirmative finding of an unsafe place in which to work is not exhausted by negative findings upon some of the facets which would go to make it unsafe.

Until all has been thus exhausted, the greater would control the lesser and no conflict could arise.

This, assuredly, is the ratio decidendi of *Arnold* and the Court of Civil Appeals so appraised it.

The converse is surely true. It is utterly inconsistent and contradictory to say that the whole is not unsafe and simultaneously aver that the condition of some constituent part or portion thereof is unsafe.

Wherever Shelton's work took him was assuredly his place to work. The place where he alighted was then his place of work.

It cannot be consistently adjudged not unsafe and yet a part thereof unsafe.

Respondent cannot be exonerated of failing to use ordinary care in furnishing a safe place to work and convicted of such failure with reference to a portion or part of the place without the grossest inconsistency.

This is the logical and only concomitant of the *Arnold* holding.

Nor has the Court of Civil Appeals resorted to any procedural nicety, as petitioner charges. Respondent simply contended that the safe place to work issue, like proper control and proper lookout, was generic and ultimate. Petitioner agreed (Sec. B of Appendix A of Petition, p. 63) and the Court simply pointed this out. It was simply petitioner's recognition of a substantive right. As an ultimate issue, it controlled over component, evidentiary finding under much basic Texas precedent.

Certainly the implicit holding of the Court in the *Arnold* case (353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840, reversing 283 S.W. 2d 303) is that the safe place to work issue is exhaustive and all inclusive and that it will control over specific findings. That opinion certainly holds that this issue controls until a conflict is established and that such conflict cannot arise until every possible ground upon which an unsafe place to work finding can be based or from which any such inference can be drawn or any such conclusion made has been fully exhausted.

The holding in the *Arnold* case cannot be misunderstood. It definitely holds that in FELA cases, a safe place to work issue is an ultimate issue that is not exhausted or ruled by specific inquiries into component factors of that issue.

It also and additionally is obvious that not only is Special Issue No. 2 a controlling and ultimate issue, but that Special Issues Nos. 8 and 9 are evidentiary issues.

That the safe place to work issue was an ultimate issue is clear and petitioner so concedes and admits that it was.

Texas City Transp. Co. v. Winters, 222 S.W. 541, (Com. App. 1920) rev. *Texas City Transp. Co. v. Winters*, 193 S.W. 366, (Galveston Civ. App. 1917). These cases further held that a negative answer to that issue would entitle the defendant to a judgment, absent any conflict.

In *McElwrath v. City of McGregor*, 58 S.W. 2d 851, (Waco Civ. App. 1933, er. dismissed), the jury found asphalt pavement defects were due to "defective materials, workmanship, plans, methods and processes" and in other issues that the contractor used too much oil, and that he did not use enough oil in mixing the asphalt in answer to claimed conflict. The court held the first issue was a controlling and ultimate issue, and further said:

> "The issues as to the particular manner or respect in which the processes as used were defective were evidentiary issues, and the findings of the jury in answer thereto would become immaterial."

Whether chatt, gravel, rocks, mounds of dirt or debris were in the area of the hump were only details of a reasonably safe place to work issue. They were simply evidentiary factors for the jury to consider in determining whether on the occasion in question, it could have been used with safety by a person using ordinary care. This was only part of a fact — part of the breadth and gravity of the safe place to work issue.

This inquiry should not have been submitted because it was evidentiary. That it was erroneously submitted and answered makes it no less evidentiary. *Southern Surety Co. v. Adams*, 34 S.W. 2d 789, (Tex. Sup. Ct., 1930).

Petitioner has attempted to raise himself by his own bootstraps and by pure semantics convert failure and omission into an action and commission. But "permitted" can mean no more than "failure to prevent." *Morris v. Texas & N.O.R. Co.*, 269 S.W. 2d 565, (Beaumont Civ. App. 1954, writ ref. n.r.e.).

Any reasoned analysis discloses that Special Issues Nos. 8 and 9 were evidentiary and concerned with evidentiary matters. *Meadowlake Foods v. Estes*, 218 S.W. 2d 862, (El Paso Civ. App. 1948, writ ref. n.r.e., 219 S.W. 2d 441).

It appears to respondent that petitioner's entire contentions are fully answered by the argument advanced by his own counsel in *Franklin v. Love*, 276 S.W. 2d 927, (Amarillo Civ. App. 1954, writ ref. n.r.e.). Petitioner's counsel here, and Justice Williams who wrote the dissenting opinion in the Court of Civil Appeals, represented the successful appellee in that case and there successfully urged the same contentions which respondent contends are applicable here.

After convicting appellant Franklin of negligence the conduct of appellee was submitted:

> "Special Issue No. 20:
>
> Do you find from a preponderance of the evidence that at the time, place and on the occasion in question Florence L. Love failed to keep a proper lookout?
>
> Answer: No."

The jury then convicted appellee Love in the following issue:

> "Special Issue No. 24:
>
> Do you find from a preponderance of the evidence that at the time, place and on the occasion in question

> Florence L. Love proceeded to cross the roadway in question with her back partially turned to approaching traffic?
>
> Answer: Yes."

Appellee's counsel there (and petitioner's counsel here) contended successfully there that the "no" answer to a proper lookout issue was not merely a failure of the evidence to preponderate, as they do here, a positive finding of an ultimate fact issue which controlled an evidentiary issue and that the latter was properly disregarded. The court agreed saying:

> "Under appellant's three points of error, the ultimate issue on this phase of the case was whether appellee failed to keep a proper lookout. The jury found that she did not fail to keep a proper lookout and in arriving at a finding on this ultimate issue they were entitled to take into consideration the evidence that appellant proceeded to cross the roadway with her back partially turned to the approaching traffic. But, the manner in which appellee proceeded to cross the roadway was not an ultimate fact issue but merely an evidentiary issue which the trial court properly disregarded in rendering judgment for appellee on the jury verdict."

The court disregarded the answers of the jury to Special Issue No. 24 and its subsidiary issue and rendered judgment for appellee Love.

Such an issue is therefore without effect, and in the event of a conflict, such evidentiary issue should be disregarded. *Bueche v. Eickenroht*, 220 S.W. 2d 911, (San Antonio Civ. App. 1919).

If the Court should hold the existence of chatt, gravel, rocks, mounds of dirt or debris are not ingredients or ele-

ments evidentiary of a reasonably safe place to work, then the conflict is fatal and irreconcilable.

These findings would then fall squarely within the rules governing such conflicts. In addition to the controlling cases cited above may be added *Grice v. Hennessey*, 327 S.W. 2d 629, (San Antonio Civ. App. 1959, no writ hist.).

The holding of the Court of Civil Appeals is therefore in this regard precisely and wholly correct.

Petitioner seeks to convert the holding of the *Arnold* case into a "heads I win, tails you lose" doctrine, but this case does not admit of that interpretation. If, under the authority of the *Arnold* case, the safe place to work issue established liability upon an affirmative answer, and remains so until every possible ground upon which it could be based has been exhausted, then a negative finding to that issue certainly established that it was not unsafe for one using ordinary care.

Petitioner's contention that a negative answer to the safe place to work issue merely establishes that the evidence did not preponderate and cannot serve as a basis for conflict lacks validity.

A simple illustration reveals how incongruous the contention is. Assume, arguendo, that only the following issues were submitted and that only the following answers made by the jury:

> "Special Issue No. 1:
>
> Do you find from a preponderance of the evidence that defendant failed to furnish plaintiff a safe place in which to work?
>
> Answer: Yes.

Special Issue No. 2:

Do you find from a preponderance of the evidence that defendant failed to furnish plaintiff a safe place in which to work?

Answer: No."

Anyone would immediately recognize that such answers were in direct and irreconcilable conflict. Yet, according to the argument petitioner advances here, such answers would not conflict. He would contend that Special Issue No. 1 was an affirmative and controlling finding and Special Issue No. 2 was immaterial since it established only that the evidence did not preponderate. According to his contention, the plaintiff would thus recover.

Insofar as a conflict is concerned, *New St. Anthony Hotel Co. v. Pryor*, 132 S.W. 2d 620, (San Antonio Civ. App. 1939, writ refused) seems to be a controlling authority. After finding that Mrs. Pryor slipped down on the floor at a point where the hotel company had caused a slippery condition to exist, the jury then answered Special Issue No. 4, which reads as follows:

"Special Issue No. 4:

Do you find from a preponderance of the evidence that the defendant was negligent in causing said slippery condition to exist, if you have found that the defendant did cause said condition to exist? Answer yes or no.

We, the jury, answer: No."

The jury, proceeding then to find that there was water at the place where she slipped and caused by the defendant to be there, then answered Special Issue No. 8 as follows:

> "Special Issue No. 8:
>
> Do you find from a preponderance of the evidence that said defendant was in negligent in causing water to be at said place and that Mrs. Pryor slipped?
>
> We, the jury, answer: Yes."

The *Pryor* case completely refutes petitioner's contention that a "yes" answer is an affirmative finding but that a "no" answer only indicates a failure of the evidence to preponderate. It completely obliterates his contention that a negative answer is not exonerating. The court at pages 623-624, said:

> "It will be noted that question No. 2 was not limited in any way, but was all inclusive, therefore, when the jury found that the Hotel Company was not negligent in maintaining the floor in its slippery condition, it included all causes of the slippery condition, whether they be butter, water, wax, or the material from which the floor was constructed."
>
> "* * *
>
> "*Appellant could not be exonerated from negligence in causing the floor to be slippery from all causes whatsoever in one set of questions and convicted of negligence in causing the floor to be slippery by causing water to be on the floor* in another set of questions." (Italics supplied)

There are many cases which set forth findings and make determinations which refute petitioner's contention in this regard. *Hancock v. Sammons*, 267 S.W. 2d 252, (Ft. Worth Civ. App. 1954, writ ref. n.r.e.); *Graham v. Dallas Ry. & Term. Co.*, 165 S.W. 2d 1002, (Dallas Civ. App. 1942, writ

refused); *Armstrong v. Missouri-Kansas-Texas R.R. Co.*, 233 S.W. 2d 942, (Dallas Civ. App. 1950, writ ref. n.r.e.; cert. ref. 342 U.S. 837, 96 L. Ed. 633, 72 S. Ct. 62); *Miller v. Texas Employers*, 63 S.W. 2d 883, (Dallas Civ. App. 1933, no writ hist.).

If the answer to Special Issue No. 2 be not viewed as an affirmative finding, then unquestionably under the foregoing authorities there is a conflict between the answers and issues under consideration.

The rules of construction so holding are set forth in *Pearson v. Doherty*, 183 S.W. 2d 453, (Texas 1944), and more recently in *Bradford v. Arhelger*, 340 S.W. 2d 772, (Texas 1960).

If the answers to Special Issues Nos. 8 and 9 are disregarded, then respondent is entitled to judgment. If the answer to Special Issue No. 2 is disregarded, then petitioner could conceivably be entitled to a judgment.

A conflict is thereby produced. *Lewis v. Texas Emp. Ins. Ass'n.*, 197 S.W. 2d 187, (Dallas Civ. App. 1946, writ ref. n.r.e.); *Little Rock Furniture Co. v. Dunn*, 222 S.W. 2d 985, (Texas 1949); and *Bradford v. Arhelger*, supra.

Such conflict is irreconcilable.

There is an additional reason which further demonstrates the fatal conflict produced.

Remembering that respondent corporation could only act in this cause through its employees and any negligent act or failure could only arise through its employees, consider the issues and pertinent portions in dispute:

"SPECIAL ISSUE NO. 2:

Do you find from a preponderance of the evidence that on the occasion in question defendant failed to furnish plaintiff a reasonably safe place in which to work?

Answer 'Yes' or 'No.'

Answer: No.

You are instructed that defendant was under a duty to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work.* * *

You are further instructed that the duty to exercise ordinary care to furnish a safe place to work * * * *has reference to the negligent acts*, if any, you find of defendant's employees on the occasion in question * * * *"* (Tr. 84) (Italics supplied)

"SPECIAL ISSUE NO. 9:

Do you find from a preponderance of the evidence that *such act* in permitting either chatt, gravel, rocks, mounds of dirt or debris to remain in the area of the hump where plaintiff alighted from the caboose * * * was negligence * * **?"*

Answer 'Yes' or 'No.'

Answer: Yes" (Tr. 86) (Italics supplied)

A safe place to work inquiry which a jury answers negatively after being expressly told that it has reference to negligent acts certainly conflicts with an inquiry into a part

of that place which the jury finds to be a negligent act. This is irreconcilable and demonstrably and fatally so upon its face. The opinion reveals that this instruction was not present in the *Arnold* case and it furnishes added reason and emphasis to the correctness of the interpretation of the Court of Civil Appeals.

The *Gallick* case is not authority here. True, it does hold that issues should be harmonized if they can be, by exegesis if necessary, but this principle is recognized and followed. However, it does not mean that there can never be a conflict of findings in an FELA case. A careful reading of that opinion discloses that it is not authority here. *Gallick v. Baltimore & O. R. Co.*, (1963), 372 U.S. 108, 9 L. Ed. 2d 618, 83 S. Ct. 659.

Petitioner, in apparent frustration, finally contends that the Texas rule of construction should have been resorted to and the verdict harmonized by holding that the specific controlled the general findings. He recognized that this was the precise point in *Arnold*, but he says disregard that decision here. On the one hand, petitioner is critical of the court that follows the logic of *Arnold* in reverse, and on the other hand says it should be absolutely disregarded in the other direction. To him precedent is a one way street in an FELA case, but the blind goddess of justice does not hold half a scale.

In apparent desperation, petitioner contends that reconciliation of the conflict can be produced by holding that

the safe place to work issue referred to another part of the yard or to an area of many acres.

He completely glosses over the meaning of "the occasion in question," in Special Issue No. 2. This term can only mean the necessity or need at the particular time of the accident and having reference to the continuing duty of respondent existing then and there. *Henderson v. Southern Ry. Co.*, 238 Ala. 356, 191 So. 234; *Mackey v. Baltimore & O. R. Co.*, 19 D.C. 282 at 301.

This inquiry was directed to and could only mean the necessity and need at the time plaintiff claims to have alighted from the caboose.

To the contrary, Special Issues Nos. 8 and 9 refer to no time and could not legitimately serve as a basis of any liability.

Indeed, respondent has contended throughout that these issues were evidentiary and never ultimate and were never possessed of sufficient certainty and, perforce, it was entitled to a judgment upon the verdict of the jury, not petitioner.

But, if Issues Nos. 8 and 9 should not be disregarded, then an irreconcilable conflict results.

Since no final judgment exists herein, and no special and important reasons or episodic issues are involved, petition for certiorari should be denied.

PRAYER

Respondent prays that the petition for writ of certiorari be, in all things, denied.

Respectfully submitted,

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MISSOURI-KANSAS-TEXAS RAILROAD CO.

By: William Raeyn Elliott

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Petitioner's Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas has been furnished to Messrs. Charles Gullett and Robert Doss, Citizens National Bank Building, Denison, Texas, and Mr. Russell M. Baker, 1610 Tower Petroleum Building, Dallas, Texas, attorneys for Petitioner, by placing same in the United States Mail, properly addressed and stamped, certified mail, return receipt requested, on this the 28th day of June, 1965.

William Raeyn Elliott